No. 89-7662

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Is petitioner's claim pertaining to the penalty-stage verdict barred by his multi-leveled procedural default?

II. Has petitioner demonstrated any reason warranting review of his attenuated Harris v. Reed claim?

III. In view of the lower courts' alternate rejection of the merits of his claims, has petitioner demonstrated any reason warranting review of his Sykes "cause" claim?

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JURISDICTION

The petitioner asserts that the jurisdiction of this Court is grounded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the Petition for Writ of Certiorari at 2, in the appendix to the Petition at a1-a6, and in the appendix to this brief at App. 1.

STATEMENT OF THE CASE

On March 18, 1982, a jury in the Circuit Court of Buchanan County, Virginia, convicted the petitioner, Roger Keith Coleman, of the rape and capital murder of his

sister-in-law, Wanda McCoy. For the rape conviction, the jury fixed Coleman's punishment at life imprisonment. The next day, after a separate hearing on the issue of punishment for the capital murder conviction, the jury fixed a sentence of death. On April 23, 1982, the Circuit Court imposed the death penalty in accordance with the jury's verdict.

The capital murder conviction and death sentence were affirmed by the Supreme Court of Virginia on September 9, 1983. Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983). This Court denied a petition for a writ of certiorari on March 19, 1984. 465 U.S. 1109 (1984).

Coleman filed a petition for a writ of habeas corpus in Buchanan County Circuit Court on April 26, 1984. On November 12-13, 1985, an evidentiary hearing was conducted in the Circuit Court. In a letter opinion dated June 23, 1986, the Circuit Court rejected Coleman's claims, and in an order signed on September 4, 1986, final judgment was entered. Coleman filed his notice of appeal in the Circuit Court on October 7, 1986.

On October 25, 1986, petitioner filed a "Motion to Correct the Date of Entry of Judgment." That motion requested the Circuit Court to "correct" the date of final judgment from September 4, 1986 to September 9, 1986. In an order dated November 10, 1986, the Circuit Court denied the motion, stating that "final judgment in this case was entered on September 4, 1986 and...the records of this Court correctly reflect that fact at the present time."

On December 3, 1986, Coleman filed a petition for appeal in the Virginia Supreme Court. On December 9, 1986, the respondent filed a motion to dismiss Coleman's appeal because the notice of appeal was untimely. By an order dated May 19, 1987, the Virginia Supreme Court granted the respondent's motion and dismissed Coleman's petition for appeal. On June 2, 1987, Coleman filed a petition for rehearing which was denied on June 12, 1987.

Coleman filed a petition for a writ of certiorari in this Court on September 10, 1987. The petition was denied on October 19, 1987. Coleman v. Bass, 108 S.Ct. 269 (1987).

Coleman then filed a habeas petition in the United States District Court for the Western District of Virginia on April 22, 1988. On September 19, 1988, after extensive briefing, the district court heard oral argument on the Commonwealth's motion to dismiss and Coleman's motion for an evidentiary hearing. In a sixteen-page opinion dated December 6, 1988, the district court concluded that most of Coleman's claims were procedurally barred by his default during the state habeas proceedings. Nevertheless, in an abundance of caution, the district court reviewed those claims, as well as the others which Coleman had raised in his petition, and concluded that Coleman was not entitled to federal habeas relief. (a25-a40).

Coleman appealed to the United States Court of Appeals for the Fourth Circuit. On January 31, 1990, the Fourth Circuit affirmed the denial of habeas relief. Coleman v. Thompson, 895 F.2d 139 (4th Cir. 1990). (a7-a22). A petition for rehearing was denied on February 27, 1990 (a23), and the Fourth Circuit's mandate issued on March 23, 1990.

STATEMENT OF FACTS[1]

Coleman was convicted and sentenced to death for the 1981 rape-murder of his wife's sister. The cause of death was a "slash wound" to the throat which had severed the victim's right carotid artery, jugular vein, and larynx. There were two stab wounds to the victim's chest, one of which had penetrated the heart and lung but had been inflicted after the victim's death. The other had penetrated the victim's liver and was inflicted after death or close to the time of death.

The evidence against Coleman was largely circumstantial, including forensic evidence that Coleman had a rare blood type possessed by only ten percent of the population, that the sperm found in the victim's vagina emanated from someone with the same blood type as Coleman's, and that two hairs found on the victim's pubic area matched Coleman's pubic hair. The evidence also included testimony that Coleman admitted to a fellow jail inmate that he and another person had participated in the rape-murder.

At the penalty stage, the Commonwealth presented evidence that Coleman had committed an attempted rape in 1977 and had been sentenced to three years in the penitentiary for that offense. In recommending the death sentence, the jury found that

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[1] A more detailed statement of facts is found in the Supreme Court of Virginia's opinion on direct appeal. Coleman, 226 Va. at 34-44, 307 S.E.2d at 865-871. In petitioner's "Statement of the Case," he misrepresents several "facts" which, although not directly related to any of his "Questions Presented," are nevertheless rebutted by the record and the district court's opinion. For instance, he claims that two allegedly exculpatory investigative reports were improperly withheld by the prosecution. (Ptn. 3-4). In rejecting Coleman's discovery claims, however, the district court ruled that petitioner's trial attorneys had been given "full access to the prosecution's entire file." (a36). Likewise without support is Coleman's assertion that his trial attorneys never prepared for the penalty stage until after the guilt stage. (Ptn. 5). In rejecting Coleman's ineffective counsel claim, the district court expressly found that counsel had properly prepared for the sentencing stage and that Coleman had expressly told his attorneys that he did not want to present any mitigation evidence. (a34). Finally, petitioner claims that the state habeas judge never resolved Coleman's allegation that a certain juror had made statements prior to trial that he "wanted to be on the jury to help execute Coleman." (Ptn. 6). This assertion, however, is directly contradicted by the district court's express finding that the state habeas court resolved the juror credibility issue in favor of the Commonwealth. (a29-a30). See also 28 U.S.C. § 2254(d).

Coleman was "future dangerous" and that his offense was "outrageously or wantonly vile" in that it involved torture, depravity of mind, and aggravated battery to the victim. See Va. Code § 19.2-264.2.

REASONS FOR DENYING THE WRIT

I.

COLEMAN'S DUE PROCESS CLAIM PERTAINING TO THE UNANIMITY OF THE PENALTY-STAGE VERDICT IS BARRED BY PROCEDURAL DEFAULT AND DOES NOT WARRANT CERTIORARI REVIEW.

Petitioner contends that he was denied due process when the penalty-stage instructions at his trial permitted the jury to return a verdict which, in Coleman's opinion, violated Virginia law because it allegedly did not specify that the jury was unanimous in finding at least one aggravating circumstance. This claim does not warrant certiorari review because it is clearly barred by procedural default, because it is constitutionally irrelevant, and because it is premised on a faulty concept of Virginia law.

A. Procedural default

Coleman concedes that he failed, both at trial and on direct appeal, to raise a due process challenge to the form of the jury's verdict. (Ptn. 18 n.7). Both the Fourth Circuit (a18) and the district court (a38) correctly ruled that, quite apart from Coleman's default during the state habeas proceedings, his earlier defaults at trial and on direct

appeal barred federal review of this claim.[2] See Wainwright v. Sykes, 433 U.S. 72 (1977).

Petitioner's perfunctory effort to establish Sykes "cause" by asserting ineffective assistance of counsel (Ptn. 18 n.7) must fail. In rejecting the identical assertion below, the district court stated:

> Coleman...contends that improper instructions were given at the penalty stage of the hearing. The court has examined these instructions and finds that they are grounded in Virginia law. Certainly counsel cannot be deemed ineffective for failing to object when the instructions accurately state Virginia law.

(a34). The Fourth Circuit expressly ratified the district court's finding of procedural default. (a18).

Thus, both courts below found that Coleman's claim is procedurally barred and that he failed to establish ineffective assistance of counsel as Sykes "cause" because the penalty-stage instructions and verdict form accurately reflected Virginia law.[3] Petitioner's unexcused default clearly constitutes an adequate and independent state ground which bars review by this Court.

B. Constitutional irrelevance

Petitioner's attack on the jury's verdict with regard to aggravating circumstances is constitutionally irrelevant. Under Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546 (1988), even if the only aggravating circumstance found at the penalty stage is later

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[2] While petitioner's second "Question Presented" (Ptn. 20) raises an issue under Harris v. Reed, __ U.S. __, 109 S.Ct. 1042 (1989), it pertains only to whether his default during state collateral proceedings can be enforced. It has no bearing on claims, such as this one, which Coleman defaulted at trial and on direct appeal. Indeed, in the Fourth Circuit, Coleman conceded that, unless he could show Sykes "cause" and "prejudice," his due process claim was barred. (See excerpt from Coleman's Fourth Circuit brief in the attached appendix at 2-3). He makes the same implicit concession in this Court. (Ptn. 18 n.7).

[3] Deference to the lower courts' view of Virginia law is appropriate because they "are better schooled in and more able to interpret the laws of their...States." See Frisby v. Schultz, __ U.S. __, 108 S.Ct. 2495, 2500 (1988).

invalidated, the death sentence will remain constitutionally valid where the required narrowing of the class of those eligible for the death penalty has been accomplished at the guilt stage. 108 S.Ct. at 555. In Virginia, the constitutionally required narrowing function is sufficiently accomplished at the guilt stage because a jury cannot convict a defendant of capital murder unless it finds beyond a reasonable doubt that the accused committed one of a class of narrowly defined capital offenses. See Va. Code § 18.2-31. (See appendix to this brief at 1).

In Coleman's case, the narrowing function was sufficiently accomplished when the jury found beyond a reasonable doubt that he committed a willful, deliberate and premeditated murder during the commission of rape. See Va. Code § 18.2-31(e). If a State can constitutionally premise a death sentence upon a finding at the penalty stage that the murder was committed during the commission of a rape, see, e.g., Gregg v. Georgia, 428 U.S. 153, 164 n.9 (1976), then by accomplishing an identical narrowing of the class of those eligible for the death penalty at the guilt stage, Virginia is not constitutionally required to accomplish any further narrowing of that class at the penalty stage. Thus, in the context of Virginia's scheme of capital punishment, Coleman's claim about whether the jury unanimously found either or both aggravating circumstances is constitutionally meaningless.

C. Faulty premise

The linchpin of Coleman's so-called "due process" claim is his assertion that the jury's sentencing verdict was defective under Virginia law. While he concedes (Ptn. 11 n.3) that the verdict was unanimous on the issue of punishment and was returned in the exact language of Virginia's statutory verdict form (Va. Code § 19.2-264.4D(i); a6), he nevertheless contends that the Virginia Supreme Court erroneously determined that the verdict satisfied the requirements of state law. (Ptn. 12). This argument must be rejected.

It is elementary that the Supreme Court of Virginia, not this Court, is the final arbiter of Virginia law. Virginia v. American Booksellers Ass'n., 484 U.S. 383, 395 (1988). Both before and after Coleman's case, the Virginia Supreme Court has consistently ruled that a penalty-stage verdict, returned in the exact wording of the statutory verdict form, is sufficient to satisfy the unanimity requirements of Virginia law. See Clark v. Commonwealth, 220 Va. 201, 213, 257 S.E.2d 784, 791-792 (1979), cert. denied, 444 U.S. 1049 (1980); Hoke v. Commonwealth, 237 Va. 303, 314-315, 377 S.E.2d 595, 602, cert. denied, 109 S.Ct. 3201 (1989). Indeed, in Hoke the Court expressly reaffirmed its prior decision in Coleman's case that a penalty-stage verdict satisfies Virginia law if it merely repeats the language set forth in Virginia Code § 19.2-264.4D. See Hoke, 237 Va. at 315, 377 S.E.2d at 602.

Petitioner's assertion (Ptn. 10) that this Court should grant certiorari to "clarify" this Court's recent treatment of Hicks v. Oklahoma, 447 U.S. 343 (1980), is meritless. In the wake of Cabana v. Bullock, 474 U.S. 376 (1986), and Clemons v. Mississippi, __ U.S. __, 110 S.Ct. 1441 (1990), Hicks needs no further clarification. Both cases make clear that, in order to establish a due process violation under Hicks, a petitioner must, at the very least, be correct in his assertion that he was denied something he was entitled to under state law. See Cabana, 474 U.S. at 387 n.4; Clemons, 110 S.Ct. at 1447-1448. In Coleman's case, the Virginia Supreme Court, as the final arbiter of Virginia law, has determined that the verdict in his case satisfied state law. See Coleman, 226 Va. at 53, 307 S.E.2d at 876. Here, as in Clemons, this Court has "no basis for disputing this interpretation of state law...." See 110 S.Ct. at 1447.

Moreover, the Fourth Circuit correctly recognized (a18-a22) that the Virginia Supreme Court, pursuant to Virginia Code § 17-110.1, reviewed Coleman's death sentence and "independently determined that the sentence of death was properly imposed." See Coleman, 226 Va. at 55, 307 S.E.2d at 877. The Supreme Court of Virginia has long exercised its authority to independently sustain a death sentence despite alleged error in

the jury's sentencing decision. See, e.g., Tuggle v. Commonwealth, 230 Va. 99, 110, 334 S.E.2d 838, 845-846 (1985), cert. denied, 478 U.S. 1010 (1986). Under Cabana and Clemons, Coleman had no constitutional right to have the sentencing determination made only by a jury, and his Hicks due process claim could not possibly succeed, even if it were not barred by procedural default.[4]

II.

COLEMAN'S HARRIS V. REED CLAIM DOES NOT WARRANT CERTIORARI REVIEW.

A. Bound by prior concessions

Coleman contends that the Fourth Circuit erred when it ruled that the Virginia Supreme Court's order dismissing his state habeas appeal (a41) satisfied the requirements of Harris v. Reed, __ U.S. __, 109 S.Ct. 1038 (1989). He admits that the Commonwealth's motion to dismiss was predicated solely on default grounds, i.e., that his notice of appeal was untimely (Ptn. 7), and he admits that the Virginia Supreme Court granted the motion to dismiss. He asserts, however, that the Commonwealth's motion "might well have been granted because the court found the petition [for appeal] to be without substantive merit." (Ptn. 22-23). This assertion must be rejected, however, because it ignores the fact that Coleman has expressly conceded, in a prior proceeding in this Court, that his state habeas appeal was dismissed on procedural grounds and that the Virginia Supreme Court never reached the merits of this claims.

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[4] This Court has recently clarified the "new rule" principle which the Court had announced earlier in Teague v. Lane, __ U.S. __, 109 S.Ct. 1060 (1989). See Butler v. McKellar, __ U.S. __, 110 S.Ct. 1212 (1990). Under Teague, a "new" decision is generally inapplicable in cases on collateral review unless the decision was "dictated" by precedent at the time the prisoner's case became final. See Teague, 109 S.Ct. at 1070. In Butler, however, this Court stated for the first time: "The 'new rule' principle...validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." 110 S.Ct. at 1217. Under Teague and Butler, the rule petitioner seeks clearly would be a "new rule" and federal relief would have been unavailable even if Coleman had not defaulted his claim.

On September 10, 1987, Coleman filed in this Court a petition for a writ of certiorari to the Supreme Court of Virginia. See Coleman v. Thompson, No. 87-5448. At page three of that petition, Coleman stated:

> In refusing to consider the merits of Coleman's petition for appeal, the [Virginia Supreme Court] ignored established precedent and the explicit language of its own rule [requiring notice of appeal within 30 days after entry of judgment]....On this basis alone, the court summarily dismissed Coleman's petition for appeal....

(See excerpt from prior certiorari petition in the appendix to this brief at 4-5; emphasis added).

Of course, once this Court decided Harris v. Reed, Coleman immediately reversed his position, and on his return visit to this Court he now argues that the Virginia Supreme Court "might well have" dismissed his habeas appeal on the merits. This Court should not countenance such cynical "flip-flopping" by a petitioner who will obviously take whatever position he deems most expedient at any given time.

B. No "special and important" reasons

It is undisputed that, when Coleman filed his state habeas appeal, the Commonwealth responded by filing a motion to dismiss based solely on the fact that, as a matter of Virginia law, Coleman's notice of appeal was untimely. (a10). It is also undisputed that the Virginia Supreme Court granted the motion to dismiss and dismissed Coleman's petition.[5] (a10, a41). Under these circumstances, Coleman's Harris v. Reed claim clearly does not warrant certiorari review.

Neither the district court (a27-a28) nor the Fourth Circuit (a11-a12) had any difficulty concluding that the Virginia Supreme Court dismissed Coleman's habeas appeal solely because of his untimely notice of appeal. Indeed, no court could have reasonably

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[5] When the Supreme Court of Virginia denies relief on the merits, it "refuses" the petition for appeal, rather than "dismisses" it. See Saunders v. Reynolds, 214 Va. 697, 700-701, 204 S.E.2d 421, 424 (1974).

reached any other conclusion. An order which expressly grants a motion to dismiss, the sole basis of which was the untimely filing of a notice of appeal, clearly satisfies the "plain statement" rule set forth in Harris v. Reed.

Coleman's strained effort to establish an alleged "split" among the Courts of Appeals concerning the application of Harris v. Reed is inapposite. All of the cases relied upon by Coleman (Ptn. 24-31) involve the issue of whether a federal court can resolve an "ambiguous" order in favor of a finding of procedural default. In petitioner's case, neither of the courts below found the Virginia Supreme Court's order to be ambiguous. To the contrary, the Fourth Circuit stated:

> Coleman's argument lacks a factual basis. The Supreme Court complied with the "plain statement" rule that Harris made applicable to habeas corpus proceedings. The Virginia Supreme Court's brief order shows precisely how the Court dealt with the petition for appeal. The Court recites that it considered all of the papers filed by the parties. The Court then granted the motion to dismiss, which was based on Coleman's failure to comply with Virginia Supreme Court Rule 5:9(a), and dismissed the appeal.

(a11, emphasis added).

Thus, even it were assumed for the sake of argument that a "split" exists among the circuits concerning how to deal with an ambiguous state-court order, such a "split" would be irrelevant to a proper disposition of Coleman's case, where no such ambiguity exists. When the Fourth Circuit has confronted a truly "ambiguous" state-court order, it has not hesitated to apply Harris v. Reed to reach the merits of a petitioner's federal claim, even where convinced that "the Virginia courts did intend to hold petitioner's claim procedurally barred...." See Evans v. Thompson, 881 F.2d 117, 123 n.2 (4th Cir. 1989).

Thus, petitioner's Harris v. Reed claim is nothing more than a mere assertion that the Fourth Circuit erred in applying Harris to the facts of his case. This Court, however, does not exercise its certiorari power merely to review perceived errors. See Ross v. Moffitt, 417 U.S. 600, 616-617 (1974). Coleman has failed to show any "special and

important" reason for granting such review.[6] See U.S.S.Ct.R. 10.1.

III.

PETITIONER HAS SHOWN NO REASON WHY THIS COURT SHOULD REVIEW HIS CLAIM CONCERNING "CAUSE" FOR HIS DEFAULT DURING STATE HABEAS PROCEEDINGS.

Coleman asserts that this Court should review the Fourth Circuit's conclusion (a14-a15) that, because he had no constitutional right to counsel during the state habeas proceedings, he could not assert "ineffective counsel" as "cause" for his procedural default during those proceedings. This argument should be rejected for a variety of reasons.

A. Underlying claims without merit

As previously mentioned, even though the district court enforced Coleman's procedural default, it also reviewed the merits of his claims and found no basis for federal habeas relief. (a29-a40). Likewise, the Fourth Circuit reviewed Coleman's claims and concluded that enforcing the default would not "result in a fundamental miscarriage of justice." (a15). The Fourth Circuit also satisfied itself that, despite Coleman's default, his constitutional challenge to his death sentence was meritless. (a18-a22).

Under these circumstances, this case would clearly be an inappropriate vehicle for reviewing the claim which Coleman is pressing. Even if the courts below had totally disregarded petitioner's state habeas default, there is no chance that he would have succeeded on the merits of his claims.

[6] Certiorari should also be denied in Coleman's case because, unlike any of the cases on which he relies, here the district court not only recognized and enforced the petitioner's procedural default, it also alternatively reached the merits of Coleman's claims and found them lacking. (a29-a40). And, as Coleman admits (Ptn. 9), despite his default, the Fourth Circuit reviewed, and found no merit in, his "capital sentencing claim." (a18-a22). Moreover, Coleman admits that his view of the proper application of Harris v. Reed necessarily "will entail an evaluation of state law" and a determination of what was "the last state court that must render a decision in order to exhaust state remedies." (Ptn. 31 n.14). Aside from the fact that Coleman never advanced such an argument in the Fourth Circuit, see Kentucky v. Stincer, 482 U.S. 730, 747 n.22 (1987), this Court should not grant certiorari to review such an attenuated claim.

B. Phantom "split"

Petitioner relies upon several cases from the Eighth Circuit, and one case from the Seventh Circuit, to support his assertion that this Court should grant certiorari to resolve an alleged "split" among the various Courts of Appeals. While he is correct in conceding that other circuits have reached the same conclusion reached by the Fourth Circuit (Ptn. 37, 42), a review of the Seventh and Eighth Circuit cases he cites reveals that Coleman's allegation of a "split" is fallacious.

While both Shook v. Clarke, 894 F.2d 1496, 1497 (8th Cir. 1990), and Shaddy v. Clarke, 890 F.2d 1016, 1018 n.4 (8th Cir. 1989), rely upon Harper v. Nix, 867 F.2d 455, 457 (8th Cir.), cert. denied, 109 S.Ct. 3194 (1989), for the proposition that a claim of ineffective habeas counsel can constitute "cause" for a procedural default, a review of Harper shows that the issue was neither raised nor decided in that case because it was undisputed that "[c]ounsel made a tactical decision to abandon" the defaulted claims. Harper, 867 F.2d at 457. Thus, neither Shook, Shaddy, nor Harper represents a definitive ruling by the Eighth Circuit that "cause" for a procedural default can be satisfied by an assertion of ineffective habeas counsel.

To the contrary, other panels of the Eighth Circuit have clearly indicated that, because there is no constitutional right to counsel during state habeas, a claim of ineffective habeas counsel cannot constitute "cause" for a procedural default. See Laws v. Armontrout, 834 F.2d 1401, 1415 n.10 (8th Cir. 1987), aff'd en banc, 863 F.2d 1377 (8th Cir. 1988), cert. denied, 109 S.Ct. 1944 (1989), citing Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir.), cert. denied, 469 U.S. 823 (1984), and Williams v. Missouri, 640 F.2d 140, 143-144 (8th Cir.), cert. denied, 451 U.S. 990 (1981). Thus, the cases from the Eighth Circuit certainly do not support Coleman's contention that there is a "split" between that Circuit and the Fourth Circuit's decision in Coleman's case.

Likewise without foundation is Coleman's assertion that the Seventh Circuit's decision in Madyun v. Young, 852 F.2d 1029, 1033 n.3 (7th Cir. 1988), represents a "split" with the Fourth Circuit. As the Fourth Circuit recognized in Coleman's case (a15), the referenced footnote in Madyun is clearly dicta. And more importantly, when the Seventh Circuit was squarely presented with the issue, it held unequivocally that a claim of ineffective habeas counsel cannot constitute Sykes "cause." See Morrison v. Duckworth, 898 F.2d 1298, 1301 (7th Cir. 1990); Buelow v. Dickey, 847 F.2d 420, 425-427 (7th Cir. 1988), cert. denied, 109 S.Ct. 1168 (1989).

Certiorari should not be granted to resolve a "conflict" which does not exist. This Court should reject Coleman's attempt to manufacture a "split" where there is none.

C. Carrier/Torna/Finley/Giarratano

The Fourth Circuit correctly applied this Court's prior decisions and rejected Coleman's assertion of "ineffective habeas counsel" as "cause" for his procedural default. In Murray v. Carrier, 477 U.S. 478, 488 (1986), this Court held that "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective...we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." (Emphasis added). And this Court has made clear that, unless one has a constitutional right to counsel, one cannot claim that his counsel was constitutionally ineffective. Pennsylvania v. Finley, 481 U.S. 551, 558 (1987) (the proposition that "the State may not cut off a right to appeal because of a lawyer's ineffectiveness...depends on a constitutional right to appointed counsel that does not exist in state habeas proceedings"); Wainwright v. Torna, 455 U.S. 586, 587-588 (1982). See also Evitts v. Lucey, 469 U.S. 387, 396 n.7 (1985) ("Of course, the right to effective assistance of counsel is dependent on the right to counsel itself.").

Clearly, Coleman did not have a constitutional right to counsel during his state habeas proceedings. See Murray v. Giarratano, __ U.S. __, 109 S.Ct. 2765, 2770 (1989); Pennsylvania v. Finley, 481 U.S. at 556. In no sense, was there any "external"

impediment to Coleman's timely perfecting of his state habeas appeal, particularly in view of the fact that Coleman's state habeas attorneys were retained counsel of his own choosing. See Torna, 455 U.S. at 588 n.4 (no due process violation where retained counsel filed discretionary appeal one day late). Thus, Coleman cannot establish Sykes "cause" by pointing to an alleged error by his habeas attorney. See Carrier, 477 U.S. at 488 ("cause" must be based on "some objective factor external to the defense").[7]

CONCLUSION

Coleman has clearly failed to present any "special and important" reasons which would warrant certiorari review. U.S.S.Ct.R. 10.1. His claims are either procedurally barred, constitutionally irrelevant, contrary to a position he has previously taken in this Court, or simply without merit. While the district court recognized Coleman's procedural default during the state habeas proceedings, that court nevertheless meticulously reviewed and rejected his claims. The Fourth Circuit also carefully reviewed the merits

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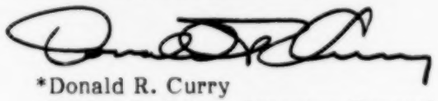
[7] According to petitioner, Fay v. Noia, 372 U.S. 391 (1963), rather than the Sykes "cause" and "prejudice" test, should govern his case. (Ptn. 46). This claim does not warrant certiorari review because it is so patently without merit. The Sykes standard is equally applicable whether the default occurred at trial, during direct appeal, or during state habeas proceedings. See Murray v. Carrier, 477 U.S. 478, 490 (1986). While the Carrier Court left undecided "whether counsel's decision not to take an appeal at all might require treatment under" Fay rather than Sykes, see Carrier, 477 U.S. at 492, the Court's reservation of that question only indicates that, if Fay has any continued vitality, it must be strictly confined to its facts. Fay, like most of the other cases Coleman relies upon (Ptn. 48), involved a default on direct appeal from a criminal conviction. See 372 U.S. at 394. While there is authority for the proposition that the decision whether to file the initial direct appeal is so fundamental that a defendant cannot be bound by his attorney's decision not to appeal, see Jones v. Barnes, 463 U.S. 745, 751 (1983), such a stringent default standard makes no sense where no fundamental right is involved. The fact that Coleman had no constitutional right to counsel for his state habeas appeal, see Finley, is a clear indication that no fundamental right was at stake in those civil proceedings. Therefore, even if Fay remains valid under the facts of that case, it has no application to Coleman's case where the default occurred, not on direct appeal, but during a state collateral appeal. See Buelow v. Dickey, 847 F.2d at 428-429; Hughes v. Idaho State Bd. of Corrections, 800 F.2d 905, 907-908 (9th Cir. 1986). Nor does it have any application where, as here, counsel did not decide to forego an appeal, but rather, decided to appeal but failed to do so in a timely manner. Coleman has advanced no reason why this Court should retreat from the Sykes/Carrier line of cases, and return to the entirely unworkable "deliberate bypass" standard of Fay v. Noia.

of Coleman's constitutional challenge to his death sentence and satisfied itself that petitioner's case did not fall within the "fundamental miscarriage of justice" exception to the Sykes default rule. Petitioner has failed to present any reason to believe that, even if all of his multitudinous defaults were overlooked or excused, he would have any reasonable probability of succeeding on the merits of his claims. Under all these circumstances, this Court should deny Coleman's petition for certiorari review.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia



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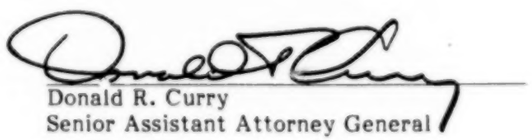
*Counsel of Record

CERTIFICATE

I hereby certify that I, Donald R. Curry, Senior Assistant Attorney General of Virginia and a member of the Bar of this Court, did on or before this 20th day of June, 1990, mail with first class postage prepaid two copies of this brief in opposition to John H. Hall, Esquire, Debevoise & Plimpton, 875 Third Avenue, New York, New York 10022, counsel of record for petitioner.



Donald R. Curry
Senior Assistant Attorney General

APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION

§ 18.2-31. Capital murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of any person in the commission of, or subsequent to, rape;

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in § 9-169 (9) when such killing is for the purpose of interfering with the performance of his official duties;

(g) The willful, deliberate and premeditated killing of more than one person as a part of the same act or transaction; and

(h) The willful, deliberate and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed with the intent to extort money or a pecuniary benefit, or with the intent to defile the victim of such abduction.

If any one or more subsections, sentences or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 300; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582; 1980, c. 221; 1981, c. 607; 1982, c. 636; 1983, c. 175; 1985, c. 428; 1988, c. 550.)

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any restraint on the arbitrary and capricious infliction of the death sentence.

The Virginia Supreme Court has itself recognized the need for a limiting instruction for the depravity of mind subpart. In Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135, 149 (1978), cert. denied, 441 U.S. 976 (1979), the court construed "depravity of mind" to mean "a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation," but neither the sentencing court nor the Virginia Supreme Court applied this limiting construction to Coleman's case. As in Godfrey, the fact that the state had used a limiting construction in prior cases does not cure the constitutional infirmity in Coleman's case. See Godfrey, 446 U.S. at 432. In the absence of sufficient limiting instructions on the "vileness" circumstance, the sentence of death was unconstitutionally imposed on Coleman because the jury's discretion was not channelled properly.

C. Because Coleman's Trial Counsel Was Ineffective For Failing To Object To The Capital Sentencing Instructions, This Court Can Hear Coleman's Claims.

Failure to object to the constitutionally infirm capital sentencing instructions constituted ineffective

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assistance of counsel. (App. 1065-69.) This ineffective assistance satisfies the cause and prejudice standard of Wainwright v. Sykes. See Murray v. Carrier, 477 U.S. 478 (1986). By failing to object to the capital sentencing instructions, Coleman's counsel allowed the Virginia capital sentencing scheme to be applied to Coleman in an unconstitutional way to his obvious prejudice. This failure to ensure that the Virginia capital sentencing scheme was applied properly to Coleman, meant that "a just result under the standards governing decision" was not reached. Strickland v. Washington, 466 U.S. 668, 687 (1984).[25] See also Daugherty v. Dugger, 839 F.2d 1426, 1428 (11th Cir. 1988), cert. denied, 109 S. Ct. 187 (1989) (counsel would be ineffective for failure to object to a jury instruction when "the instruction is improper . . . a reasonably competent attorney would have objected to the instruction, and the failure to object was prejudicial").

25. Counsel's failure to object at trial meant that they could not cure their error when representing Coleman on direct appeal. See Coleman v. Commonwealth, 307 S.E.2d at 876.

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NO. 87-5448

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

ROGER KEITH COLEMAN
Petitioner,
v.
GARY L. BASS, WARDEN,
Mecklenburg Correctional Center,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

The Petitioner, Roger Keith Coleman, respectfully petitions for a writ of certiorari to review the judgment of dismissal entered by the Supreme Court of Virginia on May 19, 1987.

OPINIONS BELOW

The judgment of the Supreme Court of Virginia dismissing Petitioner's petition for appeal is reproduced at Appendix 1. The order of the Supreme Court of Virginia denying Petitioner's Petition for Rehearing is reproduced at Appendix 2. The June 23, 1986 "opinion-letter" of Judge Glynn R. Phillips, Circuit Court of Buchanan County, Virginia, is reproduced at Appendix 3. The Final Order of that court, dated September 4, 1987 and entered on the docket September 9, 1987, is reproduced at Appendix 4.

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of his first state habeas corpus petition, apparently because the Notice of Appeal was not filed within 30 days of the signing of the final judgment below, although it was filed within 30 days of the entry (filing) of the final judgment below.[1] In refusing to consider the merits of Coleman's petition for appeal, the court ignored established precedent and the explicit language of its own rule. Under the Supreme Court of Virginia's novel interpretation, Petitioner's Notice of Appeal was one day late. On this basis alone, the court summarily dismissed Coleman's petition for appeal -- even though he raised several substantial federal constitutional arguments and the Commonwealth could not possibly have suffered any prejudice.[2] On June 12, 1987, again, without opinion, the Supreme Court of Virginia denied Mr. Coleman's Petition for Rehearing.

Roger Keith Coleman was convicted of capital murder in the Circuit Court for Buchanan County and sentenced to death. After exhausting his direct appeals to the Supreme Courts of Virginia and of the United States,[3] Coleman filed a petition for a writ of habeas corpus in the Circuit Court for Buchanan County. A

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[1] The Supreme Court of Virginia dismissed Petitioner's petition for appeal and denied his Petition for Rehearing, both without opinion. Accordingly, Petitioner can only assume that the court adopted the Commonwealth's position as articulated in its briefs.

[2] Under the court's ruling, the Notice of Appeal was due on Monday, October 6 (the first working day after October 4, the date that the Notice was due under the Commonwealth's reasoning) rather than October 7. Petitioner's Notice of Appeal was mailed to the court clerk and to the Commonwealth on the 6th, and was received by both on October 7. If Petitioner had hand-delivered the Notice to the clerk, rather than mailed it, and had still mailed a copy to the Commonwealth -- a perfectly acceptable practice -- the Commonwealth would have received notice on the same day, but the Notice would have been timely filed. Certainly the Commonwealth suffered no prejudice from the fact that the Notice of Appeal happened to be sent by mail, rather than hand-delivered, to the clerk.

[3] Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983), cert. denied, 456 U.S. 1109 (1984).